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In the Supreme Court of the United States

October Term, 1997

ROBIN SMITH,
Petitioner,

v.

OREGON STATE BAR,
Respondent.

Petition For Writ of Certiorari
To the Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED FOR REVIEW

Roughly two decades ago, this court began to strike down a number of practices that had long operated to restrict competition within the legal profession. Bans on advertising by lawyers (Bates v. Arizona State Bar (1977) 433 US 350) minimum fee schedules (Goldfarb v. Virginia State Bar (1975) 421 U.S. 773), limits on solicitation by lawyers for public interest cases (In re Primus (1978), 436 U.S. 412) and residence requirements to practice within a state's courts (Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274) have all been ruled to be unconstitutional restraints. Petitioner asks this court to take the next step in dealing with barriers to competition and access to the courts previously erected by the legal profession --to decide what limits, if any, a state may place on the dissemination of legal information by non-lawyers to members of the public.

Petitioner Robin Smith, through her then existing business called People's Paralegal Service, Inc., served over 9000 primarily low income customers between the years of 1987 and 1995. In 1995 the Oregon State Bar obtained an injunction against Petitioner on the grounds she was engaged in the unauthorized practice of law, which effectively caused Petitioner to shut her business down. The trial court made 173 findings of fact, including these:

- A significant number of people cannot afford legal services in this state and some of their legal needs are not being met by the members of the Oregon State Bar. (Finding 172, App D).

- Defendant Smith shares her knowledge of the law and of legal procedures with her customers. (Finding 140, App D)

QUESTIONS PRESENTED FOR REVIEW-Continued

- No non-lawyer has ever filed a complaint of UPL with the Oregon State Bar against Defendants (Finding 171, App D).

These findings, and the fact that Petitioner has been prohibited from in any way sharing her knowledge of the law and of legal procedures with her customers, fairly give rise to the following constitutional questions:

1) Does the Oregon law governing the unauthorized practice of law violate the free speech provision of the First and Fourteenth Amendments to the U.S. Constitution as applied to Petitioner Robin Smith?

2) Does the Oregon law governing the unauthorized practice of law facially violate the free speech provision of the First and Fourteenth Amendments to the U.S. Constitution on the ground that the law is vague and overbroad?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to this proceeding. In the proceedings below, People's Paralegal Service, Inc, an Oregon corporation, was also a party with Robin Smith. The corporation no longer exists.

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DECISIONS BELOW

The decision of the Oregon Supreme Court denying review was entered on October 7, 1997, (SC N. S44532) and is reproduced as Appendix A. The decision by the Oregon Court of Appeal was entered on July 9, 1997, (CA A89206).

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1257 (a) and Supreme Court Rule 10.1 (c).

CONSTITUIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the First and Fourteenth Amendments to the United States Constitution. The First Amendment provides that: "Congress shall make no law respecting an proper establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law..."

Oregon Revised Statute 9.160 provides: "Except for the right reserved to litigants by ORS 9.320 to prosecute or defend a cause in person, no person shall practice law or represent that person as qualified to practice law unless that person is an active member of the Oregon State Bar."

ORS 9.166 provides: "(1) If the [Board of

Governors of the Oregon State Bar has reason to believe that a person is practicing law without a license, the board may maintain a suit for injunctive relief in the name of the Oregon State Bar against any person violating ORS 9.160. The court shall enjoin any person violating ORS 9.160 from practicing law without a license.

STATEMENT OF THE CASE

From 1987 until 1995, Petitioner Robin Smith, a non-lawyer, operated a business providing certain law-related services for a fee. Previous to opening her business, Petitioner had obtained a legal assistant Associate Arts Degree, worked in a law firm for one year and apprenticed for three years with an existing legal forms preparation business. During the time that Petitioner was in business, she served in excess of 9000 customers without a complaint. From the time it became available to her in 1992, Petitioner carried errors and omissions insurance. No claims were made against her insurance policy.

The customers primarily served by Petitioner were average American working class consumers wanting help with their uncontested divorce, guardianship, name change, stepparent adoption, bankruptcy, power of attorney, health care form or will (Finding 133 App D). Many of Petitioner's customers earned in the neighborhood of the minimum wage and could not afford to hire an attorney.

Petitioner's services consisted primarily of: providing her customers with various legal forms made available to the public by a variety of sources (Finding 11, App D), answering procedural questions regarding the use of the forms and how the case would progress, and typing the forms under the direction of the customer.

On occasion Petitioner provided non-controversial substantive answers to common legal questions such as how the Oregon courts deal with child custody and what circumstances justify a guardianship?

As all times, Petitioner made it clear to her customers that she was not an attorney and could not practice law. In addition to signs to this effect posted around her office, Petitioner's intake sheets signed by the consumers included the following statement in capital letters:

"We are not attorneys. We are legal technicians. Our service provides preparation of the papers including typing, notary service, and procedural information*** If you require legal advice please see an attorney." (Finding 7, AppD).

In 1991, Petitioner founded the Oregon Legal Technicians Association (OLTA). The purpose of the organization was to lobby the Oregon legislature to implement a licensing scheme for the type of activities engaged in by Petitioner and others. Petitioner was a vocal and open proponent for this cause, and for change to ORS 9.160 that would permit Petitioner and others to offer their document preparation services to the public without violating the law. (Finding 15, App D). Petitioner's efforts were opposed by the Oregon State Bar and were unsuccessful.

In January 1992, the Oregon State Bar began to investigate the possibility of suing Petitioner for the unauthorized practice of law (UPL). After more than three years of indecision, the Oregon State Bar in 1995 filed an action for injunctive relief under ORS 9.166, alleging that

Petitioner was engaged in the unlawful practice of law under ORS 9.160. (Findings 31-47, App D).

After notice and hearing, the Circuit Court for the County of Washington (trial court) entered Findings of Fact and Conclusions of Law supporting its decision that Petitioner had engaged in the unauthorized practice of law (App D). The court entered an injunction on June 14, 1995 prohibiting Petitioner from engaging in a wide variety of activities deemed by the court to constitute UPL (App E). Specifically, the injunction prohibited Petitioner from:

1) any personal contact with any persons in the nature of consultation, explanation, recommendation, or advice regarding their legal matters

2) meeting with any persons to discuss their individual facts and circumstances relating to their need or desire for legal forms, legal services or legal assistance.

3) obtaining information orally, in writing, or in any other manner relating to individual facts and circumstances so as to assist any persons with their legal matters.

4) advising any persons regarding their eligibility for or advisability of legal remedies to address any person's particular legal matters

5) advising any persons regarding procedural functions of the court system as it relates to any person's particular legal matters including advice regarding jurisdiction or venue.

6) assisting in selecting particular forms, documents or pleadings for any persons to address their legal matters.

7) assisting in any way with the preparation or filling out of legal forms, or any parts of such forms, documents or pleadings for any persons.

8) assisting, suggesting or advising any persons how forms, documents or pleadings should be used to address or to solve particular legal problems (App E).

Petitioner appealed to the Oregon Court of Appeals. In an opinion filed July 9, 1997, the Court of Appeal s affirmed the injunction issued by the trial court. (App C). On September 10, 1997, Petitioners filed a Petition for Review with the Oregon Supreme Court (App F). On October 7, 1997 without opinion, the Oregon Supreme Court rejected the review. (App A).

HOW QUESTIONS FOR REVIEW WERE RAISED IN THE OREGON COURTS

Petitioner sought review of the questions presented for review in this Petition in the following ways:

- In the trial court, in her response to the Respondent's Petition for Injunctive Relief, the Petitioner raised the free speech provision of the First Amendment as an affirmative defense. (App H, 274).

- In the trial court, in a motion for a directed verdict, Petitioner raised the first amendment free speech issue in the following manner:

" Second motion for directed verdict, Your Honor, goes to one of our affirmative defenses. It's the freedom of speech issues that we've raised by our affirmative defense, both under the United States Constitution and under the First Amendment....." App H, 274)

"The problem is: What is the practice of law? And I think the statute is overly broad, and it fails because it encompasses and sweeps in First Amendment rights. And for both those reasons, we would move the Court for a directed verdict." (App H, 279).

The trial court refused to issue a directed verdict. And in its Conclusion of Law #5, the trial court stated that: "The law's restrictions upon Defendant's business activities, to the extent they may affect Defendants' speech, are not broader than necessary to serve the interest of the public, and an injunction prohibiting Defendants from engaging in the practice of law will not violate Defendants' rights of free speech as guaranteed by the First Amendment of the United States Constitution...." (App D)

In her *Appellants' Brief and Abstract of Record* filed in the Oregon Court of Appeals, Petitioner presented the following question on Appeal: "Whether the injunction decreed by the trial court is unconstitutionally overbroad and invalid under the Due Process guarantees of the Fourteenth Amendment and First Amendment of the United States Constitution." (App G,1)

In Section B of her *Appellant's Brief*, Petitioner argued that "the trial court's injunction violates Ms. Smith's rights to free speech and association guaranteed by the First Amendment and Fourteenth Amendments to the United States Constitution. as well as by the Oregon Constitution." (App G) Petitioner went on to argue (pg 19 of the brief):

"State and federally sanctioned legal advice is educational speech and cannot be banned absent a compelling state interest and means narrowly tailored to further the state's interest while protecting the speakers right

to speak freely. Board of Trustees, State University of N.Y. v. Fox, 492 U.S. 469, 482 (1989)."

In its opinion affirming the trial court's injunction, the Oregon Court of Appeal rejected Petitioner's First Amendment argument as follows:

"That argument fails. As we have explained, the injunction does not ban speech qua speech; it restrains speech in the context of a putatively professional relationship. As significantly, defendants have not demonstrated that they actually engage in practices within the supposed areas of overbreadth. (fn) Finally, and in all events, defendants argument assumes, without apt authority or analysis, that the First Amendment somehow generally preempts state law-based restraints on unauthorized legal practice of law." (App C, 27).

In her Petition for Review in the Supreme Court of Oregon, Petitioner presented the following question for review:

"1. Whether the injunction decreed by the trial court is unconstitutionally overbroad in banning petitioners not only from statutorily unauthorized practice of law but also from all those forms of practice of law permitted by the state to all non-lawyer citizens of Oregon." (App F,1)

In her Petition for Review, Petitioner went on to state that "[T]he injunction's inclusion within its ban those forms of law practice which the state authorizes non-lawyers to practice violates federal First Amendment guarantees in that there is no compelling interest in the state's banning petitioners from the practice of law which the state authorizes non-lawyers to practice." (App F) Petitioner also stated in her Petition for Review that "Legal

advice is fully protected speech under the First Amendment to the United States Constitution. As such it cannot be intruded upon absent a compelling government interest."

On October 7, 1997, the Oregon Supreme Court denied review without comment. (App A)

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT:, TO WHAT EXTENT UNDER THE FIRST AMENDMENT CAN STATE UNAUTHORIZED PRACTICE LAWS PREVENT NON-LAWYERS FROM ORALLY DISSEMINATING LEGAL INFORMATION TO MEMBERS OF THE PUBLIC

This case is about a non-lawyer providing law-related services directly to the public. This type of activity has a long history. To quote from the American Bar Association's 1995 report *NonLawyer Activity in Law-Related Situations*:

"From the founding of the colonies until today, non-lawyers have participated with lawyers in the giving of advice and assistance to others on matters involving the law. The role of non-lawyers in the process waxed and waned until the eve of the 20th century. Then, in a span of about 70 years, requirements for admission to practice law became more rigorous and laws prohibiting the unauthorized practice of law (UPL) were enacted. The 1930s began several decades of aggressive enforcement of UPL laws. The last 20 years have seen a gradual decline of enforcement, although increased activity by prosecutors or state bar UPL committees has occurred in several jurisdictions in the last few years."

Also during the last 20 years, the modern self-help law movement was born. In 1967, in New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984 (App.Div.), *rev'd on the dissenting opinion, 287 N.Y.S.2d 422*, the New York Court of Appeals held that the publication and distribution of self-help law materials, including forms and instructions for filling them in, was constitutionally protected activity under the First Amendment and was not subject to the New York UPL laws. By the mid 1970s to early 1980s, self-help law books began to appear in regular bookstores, especially in the Western states.

As the number and sales of self-help law publications increased, so too did the demand for providers of clerical services familiar with the procedures and requirements specific to such areas as divorce and bankruptcy. As with so many other trends, this one was initially centered in California, but by the 1980s, self-representation based on the information in published materials and coupled with form preparation by non-lawyer clerical services became a popular option throughout most of the Western states, and Florida.

It should be noted that both self-help publications and the supportive clerical services almost never were directed towards contested cases that required advocacy in a court of law. Rather, the self-help law movement was almost always restricted to situations where the court was acting in an essentially administrative role processing of paperwork in an uncontested context.

In the early 1980s, the American Bar Association first started talking about a legal access gap. It estimated that at least 100 million Americans lacked adequate access to the courts, often because they lacked affordable legal services. The American Bar Association's Special Committee on the

Delivery of Legal Services began studying self-help law in earnest, selecting Arizona as its primary study site. It first published a report on self-representation in Arizona in the legal areas of divorce and bankruptcy (Cox, *Self-Help Law: Its Many Perspectives*, ABA, 1984). This report found self-representation to be an acceptable option for those who engaged in it. In 1993 the same ABA Committee (now named the Standing Committee on the Delivery of Legal Services) focused its attention on the Maricopa County family court (Phoenix). The Committee's report (Sales, *Self-Representation in Divorce Cases*, ABA, 1993) disclosed that over 50% of the divorces were being handled without lawyers on either side and that only about 10% had lawyers on both sides. These numbers were fairly typical of those found in other Western states.

As self-help divorces grew in number, so did the number of businesses specializing in typing, serving and filing divorce papers. These businesses operated in a number of different ways. Many of them simply assumed the role of scriveners, typing forms under the direction and control of the customer, who got his or her information about which forms to use and what to put in them from a relevant self-help publication. In some cases the form preparation service also sold the publication while in others customers were referred to the local book store. This basic service delivery model remains the most prevalent as of 1998.

But many form preparation services have gone beyond the scrivener role and are willing to answer incidental and basic questions about how a particular legal process works and what information needs to go in the forms. Still, the main thrust of these businesses is typing, filing and serving legal papers for people who have chosen to represent themselves, and not the provision of legal expertise. This model most closely describes Petitioner's activities.

Concomitant with the growth of legal form preparation services alternatively referred to as independent paralegals and legal technicians has been the fitful efforts of state bar associations to either study them (cf State Bar of California, *Report of the Public Protection Committee*,1988) or drive them out of business on the ground that they are engaged in the unauthorized practice of law. All states except Arizona have laws against the unauthorized practice of law, and about two out of three states make UPL a crime.

The primary rationale advanced for UPL laws by the courts, bar associations and legislatures has been consumer protection. However, there has never been any meat on these bones. In a seminal study of UPL enforcement, Deborah Rhode discovered that virtually all UPL enforcement was based on complaints by lawyers rather than consumers, and that consumer harm was virtually absent from all previously filed UPL cases. Rhode, *Authorized Practice*, Vol. 34:1, Stanford Law Review

In 1992, the American Bar Association launched a massive three year national study of non-lawyer legal service providers. In its 1995 report titled *NonLawyer Activity in Law Related Situations*, the 16 member ABA Commission on NonLawyer Practice found that legal technicians were both pervasive, especially in the West, and almost entirely unregulated. The report cited anecdotal evidence that some legal technicians had caused harm by imparting erroneous legal information to their customers primarily in immigration cases. However, the various formal surveys and eight public hearings conducted as part of the Commission's study failed to produce any real evidence of harm.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE FREE SPEECH PROVISIONS OF THE FIRST AMENDMENT BECAUSE IT BARS PETITIONER FROM ENGAGING IN FULLY PROTECTED SPEECH

A. How Oregon Defines the Unauthorized Practice of Law

This petition is being filed because Petitioner, a non-lawyer, was found to have engaged in the unauthorized practice of law and was subjected to injunctive relief and ordered to pay an attorney's fees award of $16,000 (attorney expenses on appeal. As is true in many state, the state of Oregon's legislature does not define the "practice of law." Rather ORS 9.166 provides that anyone not a lawyer who is practicing law can be enjoined from doing so. UPL is not a crime in Oregon.

If there is no statutory definition of "practice of law," how can a non-lawyer know whether he or she is engaged in the practice of law? Again as is true in most state, the definition of UPL is crafted by the Oregon Courts on a case by case basis. This means that to know whether a particular activity will or will not be considered the unauthorized practice of law, the non-lawyer must: Become familiar with the existing case law, and be able to predict how this case law will impact on his or her proposed activities.

Unlike any other area of law, a prospective legal form preparation service is foreclosed from obtaining reliable legal advice on this issue from the local lawyer community, due to the inherent conflict of interest between lawyers and non-lawyers who would offer consumers an alternative to lawyers. Assuming, however, the ability of a particular lawyer to overcome this conflict of interest, the lawyer will

inevitably be forced to issue an opinion that almost any proposed activity would constitute UPL. This stems from the extreme broadness of UPL as defined by the Oregon courts and from the fact that all attorneys are ethically constrained by their professional responsibility rules from assisting another to engage in UPL.

The governing case law in Oregon is Oregon State Bar v. Gilchrist, 272 Or 552, 538 P.2d 913 (1975). This case decided two questions:

- Is it the unauthorized practice of law to disseminate published legal materials?

-Is it the unauthorized practice of law to communicate with the purchasers of those materials for the purpose of helping them prepare court documents?

The court decided the first question in the negative on the basis of New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984 (App.Div.), *rev'd on the dissenting opinion, 287 N.Y.S.2d 422* (1967). However, the court answered the second question in the affirmative, as follows:

> "All personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's marital problems does constitute the practice of law and must be and is strictly enjoined."

As Gilchrist is the last judicial word on this subject in Oregon prior to the instant case this paragraph defines the unauthorized practice of law in Oregon as it pertains to

legal form preparation services at all times relevant to this case.

It should be noted that Oregon's UPL law, like most state UPL laws, does not depend on whether UPL resulted from business or non-profit activity. Although the instant case involves a business, the same law that was applied to Petitioner could equally be applied, for example, to a battered woman's shelter that counseled its clients for free on how to obtain a temporary restraining order.

B. The Injunction Issued in this Case Is Not Inconsistent With the Gilchrist case.

Earlier, the verbatim terms of the injunction issued against Petitioner were set out in the Statement of the case.

This injunction is logically supported by the Gilchrist language, which among other things prohibits "personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's marital problems" (emphasis added).

While denying Petitioner's Motion for Directed Verdict from the bench, the trial judge demonstrated just how broad the Gilchrist case really is:

> The Court: "The difficulty that you get into in certain situations, whether you're the legislature or whether you're the Supreme Court or you're the Ninth Circuit or you're the Court of Appeals or you're a Circuit Court judge, is there are those things and the one that we all hear about is pornography that you know it

> when you see it, but you can't put it in words. And brighter people than I have had that particular problem. The practice of law, like pornography, has that same kind of problem, especially when you get out towards the periphery." (App H)

Comparing the practice of law with pornography in terms of its vagueness is apt. But it offends common sense to suggest that the same "know it when you see it" rule can be used both to decide when UPL has occurred and when particular materials are pornographic. The analogy would be germane if licensed pornographers were given the function of initially determining what was pornographic and barring others from producing it in competition with themselves. And if pornography is protected when it serves a serious artistic purpose, what can be said about legal information which serves the fundamental right of accessing a branch of government and gaining basic legal entitlements.?

C. The Oregon UPL Law as Applied to Petitioner Violates the Free Speech Provision of the First and Fourteenth Amendments

1. Petitioner Concedes the Legal Profession Is Subject to State Regulation

This court has long upheld the right of a state to regulate the legal profession. Goldfarb v. Virginia State Bar, 421 .S. 773 (1975), Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Although this court has previously struck down anti competitive practices, it has always upheld the concept of occupational licensing as such.

Importantly, Petitioner is not challenging a state's right to regulate the legal profession. Rather, Petitioner is raising the question of how far the legal profession's monopoly over

legal information can constitutionally extend. Under Gilchrist (and in the injunction issued against Petitioner), the legal profession's monopoly has been extended, in effect, to any oral interchange between a non-lawyer and a customer regarding the customer's need to use the Oregon courts. Petitioner argues here that this extension of the lawyer monopoly is far beyond what the First Amendment permits.

2. The House of Practice of Law Has Many Mansions

In Chapter 5 of his well regarded book *American Lawyers* (Oxford University Press, 1989), UCLA law professor Richard L. Abel, traces the history of how lawyers came to define their monopoly and defend its boundaries against lay competitors. He points out that until 1870 the legal profession was primarily concerned with its exclusive right to represent people in court. Then the profession turned its attention to out-of-court "incursions" by title insurance companies, credit and collection agencies, banks and trust companies, accountants, automobile clubs, mortgage and insurance companies and lay representatives seeking to appear before administrative agencies. Both the ABA and state bar associations encouraged restrictive legislation over these out-of-court activities, and to a large extent succeeded in either pushing them under the UPL umbrella or addressing them in "treaties" with organizations representing these other groups that clearly delineated the scope of permissible activities. Most of these treaties were abrogated when the very concept came under review of the U.S. Attorney General's antitrust division in the late 1970s.

In large part because of these monopoly building activities, state statutes and UPL case law consigns in all of the following to be the practice of law: 1) representing people in contested court cases as an advocate 2) advising people as to what decisions to make in a court case 3) advising

people as to what decisions to make in a non-judicial matter (such as estate planning) 4) representing people in their dealings with court clerks in uncontested situations (as an intermediary) 5) explaining to people what going to court might accomplish for them 6) explaining to people what a particular court process entails 7) drafting complex transactional forms and court pleadings 8) drafting simple pleadings in uncontested cases 9) helping people to complete check the box fill in the blanks forms that are far less complex than those required to file your taxes or apply for social security or welfare benefits 10) explaining how official court forms are used, and 11) defining technical terms that people need to understand in order to handle their own legal affairs.

The fact is, virtually all law-related information targeted to an individual's situation is off limits to anyone but a lawyer. Bar associations have consistently maintained that explaining law-related matters to people is the same as giving them advice. No UPL case has ever distinguished between disseminating legal information and giving legal advice.

Petitioner does not seek a ruling permitting her to engage in all of these roles. She recognizes that states have an interest in assuring that consumers aren't harmed by errant advice or information that may deeply impact their legal rights. For that very reason, Petitioner dedicated herself in 1991 to working with the Oregon legislature to examine these and other roles and come up with a regulatory scheme that would sensibly permit some of them to be engaged in by non-lawyers under appropriate regulations while reserving others to members of the Oregon Bar. Petitioner does not want to be a lawyer. But Petitioner wants to be able to help the large number of Oregonians who simply can't afford a

lawyer and who are willing to handle their own cases with Petitioner's help.

3. Legal Advice is Fully Protected Speech Under the First and Fourteenth Amendments

In Board of Trustees, State Univ of N.Y. v. Fox, 492 U.S. 469 (1989, this court noted that "legal advice" is fully protected speech. At issue in Fox was a free speech challenge to a public university's rule essentially banning from the dormitories anyone whose motive in entering was to make a profit. The court first pointed out that the ban implicated non-commercial as well as commercial speech in that it would ban a student from receiving medical or legal advice in his or her dorm room (492 U.S. at 482). The court then cited N.Y. Times v. Sullivan for the proposition that legal advice is non-commercial speech even if it is delivered for a fee:

While these examples consist of speech for a profit, they do not consist of speech that *proposes* (emphasis in original) a commercial transaction, which is what defines commercial speech, see Virginia Pharmacy Board, 425 U.S. at 761(collecting cases). Some of our most valued forms of fully protected speech are uttered for a profit. See, e.g., New York Times Co. v. Sullivan, 492 U. S. at 482.

In his dissent from the majority decision remanding the case, Justice Blackmun noted:

"As the majority correctly observes, the resolution so interpreted prohibits not only commercial speech (i.e., speech proposing a commercial transaction), but also a wide range of speech that receives the fullest protection of the First Amendment , 492 U.S. at 482.

4. The Activities Enjoined by the Oregon Trial Court Are Fully Protected Speech

If legal advice is fully protected speech, so are the activities enjoined by the trial court in this case. There is no issue of unauthorized legal representation here. Petitioner did not undertake to represent her customers in or out or court, nor to act as their fiduciary. Nor did she hold herself out as a lawyer or as a legal expert. Petitioner's only pure conduct was typing legal forms. All of her other activities held to constitute UPL and barred by the injunction had to do with communicating legal information of a primarily procedural nature that is, information about how the law works in certain types of cases such as divorce and guardianship and about how to use the Oregon judicial system which is, after all, a branch of the Oregon government. Specifically, Petitioner answered such questions as: How long do I have to live in Oregon to file for divorce? How long does a divorce take? I haven't seen my spouse for 2 years. How w do I divorce him? Does my spouse need to sign the papers? Do I need to notify the Children's Services Division when I file for an adoption? Where do I file a bankruptcy? How many copies of the forms will I need? What is a codicil? Does a Power of Attorney have to be notarized? How many witnesses will I need for my will? Is there a court hearing for a name change?

Under traditional First Amendment analysis, fully protected speech remains fully protected no matter who engages in it. For instance, legal advice, which is fully protected speech when uttered by lawyers (Cf State University of New York v. Fox) should not become less protected simply because it is uttered by non-lawyers. Rather, to the extent that a state has a compelling interest in regulating the content of legal advice or legal information uttered by a non-lawyer, this interest must be advanced through a constitutionally

permissible system of regulation instead of by barring the speech altogether except when a lawyer utters it.

5. Oregon Must Have A Compelling State Interest in Banning All People But Lawyers From Engaging In Fully Protected Speech

Once a type of speech is determined to be fully protected under the First Amendment, prohibiting a person from engaging in that speech is presumptively unconstitutional. The prohibition may only be upheld if the state offers a "compelling state interest" for the regulation. NAACP v. Button, 371 U.S. 415 (1963). Because no court has ever ruled that legal information or legal advice offered by a non-lawyer is fully protected speech under the First Amendment, no court has ever had to rule on the question of whether states have a compelling state interest in maintaining their UPL laws.

The almost universal rationale advanced for UPL laws by the courts that have enforced them is the need to protect consumers against receiving erroneous legal information or advice. But several comprehensive academic studies have reported the virtual absence of any evidence that consumers are harmed by non-lawyers assisting people in uncontested matters, and Petitioner is unaware of any studies that establish the existence of such harm. See eg, Rhode, *Authorized Practice*, Vol. 34:1, Stanford Law Review; Christensen, *The Unauthorized Practice of Law; Do Good Fences Really Make Good Neighbors Even Good Sense?;* American Bar Foundation Research Journal (Spring 1980); ABA Commission on NonLawyer Practice, *NonLawyer Activity in Law-Related Situations* (1995).

The state of Oregon undoubtedly will argue that consumer protection is a compelling state interest justifying banning

the Petitioner and other non-lawyers from transmitting legal information to their customers. However, the fact that a huge legal access gap exists for many millions of Americans (the ABA has estimated that in excess of 100 millions Americans have unmet legal needs because of how the legal system is structured) makes an equally strong argument that UPL laws cause far more consumer harm than they prevent.

In Edenfield v. Fane 507 U.S. 761 (1993), a commercial speech case, this court invalidated an occupational restriction on solicitations by licensed accountants. In response to the state's argument regarding its interests in the regulation, this court noted that the states:

> "burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real, and that its restriction will in fact alleviate them to a material degree."

Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression (507 U.S. at 771).

The State of Oregon has no studies justifying its claimed interests (in fact, all pertinent studies in other states draw the opposite conclusion). It is true that the trial court concluded in a "discussion" following its "Findings and Conclusions" that Petitioner "has done great harm to some of her customers." (App D). However, this statement is not supported by the Findings of Fact,

Assuming that the speech in question here is held by this court to be fully protected under the First Amendment, the

State of Oregon will have the even greater "compelling interest" burden to justify the absolute ban on the dissemination of legal information by non-lawyers.

6. Assuming Oregon has a Compelling Interest in Regulating the Dissemination of Legal Information by Non-lawyers, UPL is Not A Narrowly Tailored Method of Serving That Interest

Under the Oregon UPL laws as applied to Petitioner, Petitioner may not personally offer any substantive or procedural information to her clients regarding an Oregon divorce. In this regard, Oregon's UPL laws are typical of those in other states, which often prohibit non-lawyers from providing any information about how to access and use the courts. Put another way, under these laws only lawyers (and those under their direct control and supervision)are authorized to disseminate legal information to the public in a one-on-one context.

For people undertaking to represent themselves, these UPL rules mean that they must obtain all their information from books or from lawyers. What this means in practice is that people who have sub-par reading or language skills and who also cannot afford lawyers are completely deprived of access to the courts, often for the lack of supportive information that is routine and trivial. Many of these are surely the very same people who the ABA in its various "legal needs" studies has found to be underserved by our current legal system. Imagine the barriers a self helper faces when none but a lawyer can answer questions like the ones listed earlier in Section C.4.

Assuming, then, that legal information or legal advice is fully protected speech, and further assuming that the State of Oregon is found to have a compelling interest in

regulating that speech by non-lawyers, the final question to address is whether the Oregon UPL laws are narrowly tailored to satisfy that compelling state interest.

We start with the fact that no U.S. Supreme Court case has, after first identifying speech as fully protected, acquiesced in a regulatory system that forbade that speech to all but a handful of individuals who were licensed by the government to engage in it. But this is precisely how UPL laws operate. They forbid everyone except licensed lawyers from imparting information about the law and about how to use and access a branch of government. In this respect, current UPL laws achieve the exact opposite of narrow tailoring. In fact UPL laws are specifically tailored to have all the subtlety of a blunderbuss. That this is no exaggeration can be seen from the fact that Oregon makes no effort to statutorily define UPL but rather leaves it to be defined by the courts on a case by case basis.

In many ways the instant case is like the situation in Airport Commissioners v. Jews For Jesus, 482 U.S. 569 (1987). There, an airport regulation banned "all First Amendment activities" in the central terminal. In ruling that the regulation on its face violated the First Amendment, this court stated: " We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." [482 U.S. 574-575]"

In addition to preventing many types of people from engaging in self-representation, the locking up of legal information in the hands of a small government-sanctioned group of lawyers has certainly helped to make us into a society of legal illiterates. Information is the lifeblood of a democracy, especially information about how to access and use the government itself, whatever the branch. The freer

such information flows, the better the democracy works. Blockages in the information pipeline, on the other hand, tend to unfairly concentrate power in the hands of the privileged. This is the exact rationale that the U.S. Supreme Court used in the commercial speech case of Bates v. State Bar of Arizona, 433 US 350 (1977) to strike down blanket bans on lawyer advertising. And like the ban on advertising struck down in Bates, UPL restrictions have been a vital part of the legal profession's efforts to define and maintain its monopoly. That is, they were intentionally set up to prevent competition; the consumer protection justification came later. (American Lawyers, Abel, Oxford University Press). The case against UPL laws that throw an all-encompassing blanket over fully protected speech such as the dissemination of legal information is even more compelling than in the case of the commercial speech addressed in Bates.

Professional licensing has long been a mainstay of the American regulatory landscape and it may seem, on the face of it, as inherently reasonable to regulate the legal profession as any other. And since regulation always implies a border between who is authorized to practice the profession and who is not, it seems reasonable to punish people who illegally cross this border, however it is defined. As the Oregon Court of Appeals put it, "[T]he practice of law involves conduct, processes, and relationships that transcend mere expression. In that respect, ORS 9.160 and the corollary legal licensing statutes are no different from other professional licensing and regulatory schemes." (App C)

The problem with this rationale is that the legal profession really is like no other. A major portion of its stock in trade is information about how to access and use a branch of government, a commodity vital to exercising the rights of

citizens. While an argument can be made that courts have historically had the right to decide who serves as an intermediary between a party and the court, this argument cannot constitutionally be extended to the dissemination of legal information about how to access the courts. This is not to say that laws protecting consumers against the consequences of bad legal information and advice aren't appropriate. But consumer protection laws are a far different matter than prohibiting most of the population from imparting or receiving an entire category of speech that is central to their ability to secure their legal rights in a court of law.

7. The State of Oregon Has Reasonably Available Regulatory Alternatives

Assuming that this court strikes down Oregon's UPL law under the First Amendment, how might the State of Oregon protect its consumers against receiving erroneous legal information or advice?

First, with relatively few exceptions, there has been no attempt by the State of Oregon to regulate legal document preparation services or their activities at any level. Indeed, when Petitioner tried to get a licensing bill past the Oregon legislature, the Oregon State Bar opposed it. And so, occupational regulation is as yet an untried option for the type of services offered by Petitioner and others. There is precedent for such regulation. For example, many states, including Oregon, offer limited practice licenses for real estate brokers (for activities that are still considered UPL in other states). See eg Cultum v. Heritage House Realtors, Inc., 694 P.2d 630 (Wash. 1985).

Second, the State of Oregon has it within its power to inform its citizens about the relative merits of getting legal

information from a lawyer as opposed to a non-lawyer. To quote from the ABA report, *Non-lawyer Activity in Law-Related Situations* :

"Americans are independent-minded and historically value choice in purchasing services of any kind. Government efforts to restrict individual choice are, thus, unpopular in this country. Further, we can reasonably assume that when consumers know the pros and cons of the choices of assistance, they will make reasonable ones with which government need not unduly interfere." (Pg 133) The Report goes on to detail "the current array of approaches to federal tax preparation and advice, a law related area that affects almost everyone including self-help consumer software, IRS tax advise, Tax preparation services, CPA, enrolled tax agents and lawyers. The report goes on to suggest that this many-options model can be useful for how "the legal profession, together with non-lawyers, can offer the public the kinds of affordable, appropriate and reasonably safe help for law-related matters that the public seeks in many areas."

To decide whether regulation is needed for a particular law-related task, the report suggests (Part Two, Section D) a three part criteria: 1) Does the non-lawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being? 2) Do potential consumers of law-related non-lawyer services have the knowledge needed to properly evaluate the qualifications of non-lawyers offering the services? 3) Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?

Still another approach to regulation can be found in the Report of the California State Bar's Public Protection Committee published in 1988. In that report, an eight

member committee (half lawyers and half non-lawyers) unanimously recommended that the legislature enact a number of consumer protection statutes that would require all non-lawyers providing law-related services to register and would provide injured customers with targeted speedy and affordable remedies.

If the Oregon judiciary is concerned about the impact that a more permissive environment for legal information might have on its operations, it can do what other government entities do. It can take steps to provide enough information to allow people to use the courts without information intermediaries, if that is their choice. The judiciary may also simplify its procedures so that less outside clerical assistance is necessary. Lest this approach be thought unfeasible, the Maricopa County Superior Court in Arizona has recently established a pro per service in the courthouse and by all reports, people are now able to do much of their own legal work without the use of an intermediary whether it be a lawyer or a legal typing service. And thanks to training sessions conducted by the Maricopa Superior Court, a number of other states are following their lead.

III. THIS PETITION SHOULD BE GRANTED BECAUSE THE OREGON UPL LAW IS OVERBROAD AND INVALID ON ITS FACE IN THAT IT BANS AN UNDEFINED CATEGORY OF FULLY PROTECTED SPEECH.

Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987) states the test for when a rule may be declared to be facially invalid:

"Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it

also threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985).

When a law such as the Oregon UPL law is intended to be so broad that it is left undefined, it certainly meets the overbreadth test and should be struck down without regard to the facts of Petitioner's individual case. Returning to the Gilchrist case, it's hard to imagine a broader ban on an entire category of fully protected speech. Without question, the Oregon UPL law not only bans speech that might reasonably be considered to be the practice of law, it also chills speech that articulates general information available in writing, often in government documents intended to instruct the public on handling a legal problem, or in privately published materials often authored by lawyer-experts. For example, a law library reference librarian or a court clerk may be reluctant to answer the simplest question about Oregon law or legal procedure. Only by standing the First Amendment on its head can this type of ban of fully protected speech be justified.

CONCLUSION

Millions of Americans suffer from a legal access gap created by our current legal system. This access gap exists in Oregon as well as in most other states. Under the Oregon UPL statute, as interpreted by Oregon case law, Petitioner is prevented from personally disseminating any information that would help her customers access and use the Oregon judiciary. The dissemination of legal information in a one on one context is fully protected speech under the First Amendment to the U.S. Constitution. Petitioner and other

non-lawyers may only be barred from engaging in such speech if the State of Oregon has a compelling state interest in such a drastic form of regulation. Oregon has failed to demonstrate this compelling state interest, but if it does, its method of serving that interest must be narrowly tailored. The Oregon UPL law is the broadest rather than the narrowest possible method of serving its interests, and cannot, therefore, withstand scrutiny under the First Amendment, both as applied and on its face. Assuming that Oregon has a compelling interest to regulate legal information and advice, many regulatory devices other than the UPL laws are available to Oregon for this purpose.

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APPENDIX

A. ORDER DENYING REVIEW

B. MONEY JUDGMENT

C. OREGON COURT OF APPEALS DECISION, HASELTON, J.

D. FINDINGS OF FACT AND CONCLUSIONS OF LAW

E. JUDGMENT AND DECREE PERMANENT INJUNCION

F. PETITION FOR REVIEW TO OREGON SUPREME COURT

G. APPEALANT'S BRIEF

H. TRANSCRIPT TRIAL COURT, SELECTIONS

I. ABA NON LAWYER ACTIVITY IN LAW RELATED SITUATIONS, SELECTIONS